



Signed: June 26, 2007

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 06-42175 TT
Chapter 7
In re MICHAEL JOSEPH BERTEL,
Debtor.

MEMORANDUM OF DECISION RE MOTION TO DISMISS

The Office of the United States Trustee (the "UST") moves to dismiss the above-captioned case under 11 U.S.C. § 707. The above-captioned debtor (the "Debtor") opposes the motion. For the reasons stated below, the motion will be granted.

DISCUSSION

The Debtor filed a voluntary petition seeking relief under chapter 13 of the Bankruptcy Code on November 14, 2006. On January 9, 2007, the chapter 13 trustee (the "Trustee") filed a motion to dismiss the case on the ground that the Debtor's debt exceeded the chapter 13 debt limits. See 11 U.S.C. § 109(e). There is no dispute that the Debtor's secured debts were in excess of the chapter 13 debt limits when he filed. Consequently, rather than oppose the motion, the Debtor filed a motion to convert the case to chapter 7, and the

1 case was converted on February 1, 2007. A meeting of creditors in
2 the chapter 7 case was conducted on February 21, 2007.

3 On April 4, 2007, the UST filed a motion to dismiss the chapter
4 7 case pursuant to 11 U.S.C. § 707(b)(2). Section 707(b)(2) applies
5 only to debtors whose income during the six months before filing for
6 bankruptcy exceeds the median ("current monthly income"). The income
7 disclosed by the Debtor in his bankruptcy filings indicated that the
8 Debtor's income during this period was above the median.

9 Above-median debtors are required to complete Form B22A, which
10 calculates their ability to repay their debts over a five year period
11 after deducting from their current monthly income expenses prescribed
12 by Internal Revenue Service guidelines: i.e., the "means test." If
13 this calculation demonstrates a statutorily quantified ability to
14 repay, there is a presumption that the case is abusive. Based on the
15 deductions listed by the Debtor in his Form B22A, he had insufficient
16 income to repay his debts to give rise to a presumption of abuse.

17 Nevertheless, the UST contended that the case was presumptively
18 abusive. She contended that the Debtor should not be entitled to
19 take deductions for secured debt payments on real property that he
20 intended to sell or abandon and perhaps already had sold or lost at
21 foreclosure. The Debtor opposed the motion on both legal and factual
22 grounds. He contended that he was entitled to take the deductions
23 without regard to his intent because he was contractually bound to
24 make the payments. Additionally, he disputed the factual contention
25 that the real property had been sold or that he intended to abandon
26 it. To the contrary, he stated that he filed for bankruptcy to avoid

1 losing it at foreclosure in the hopes of refinancing the secured debt
2 or selling the real property for a profit at some time in the future.

3 The hearing on the motion was continued, and the UST took the
4 Debtor's deposition. At the deposition, the UST learned that the
5 Debtor had lied in his bankruptcy filings about his current monthly
6 income. In fact, he had received little income during the six months
7 prior to bankruptcy. Therefore, he was not subject to the "means
8 test" set forth in Form B22A, and his case was not presumptively
9 abusive.

10 On June 1, 2007, the UST filed a supplemental motion to dismiss,
11 seeking to dismiss the case under 11 U.S.C. § 707(a) or (b)(3)
12 instead of under § 707(b)(2). Section 707(a) provides that a
13 bankruptcy case may be dismissed for, among other reasons,
14 "unreasonable delay...that is prejudicial to creditors...." Section
15 707(b)(3) provides that a case may be dismissed as an abuse if "the
16 debtor filed the petition in bad faith...." The UST asked the Court
17 to dismiss the chapter 7 case with prejudice pursuant to 11 U.S.C. §
18 349(a) so that the Debtor could not discharge his existing debts in
19 a future bankruptcy case.

20 The UST acknowledged that, with exceptions not relevant here,
21 Rule 1017(e)(1) of the Federal Rules of Bankruptcy Procedure ("FRBP")
22 provides that a motion to dismiss a case for abuse under 11 U.S.C. §
23 707(b) must be filed within 60 days after the first date set for the
24 meeting of creditors. In this case, the deadline for such a motion
25 was April 23, 2007. Although the original motion was filed before
26

1 the deadline, the supplemental motion, which changed the basis for
2 the motion, was not filed prior to this deadline.

3 The UST argued that the supplemental motion should be deemed to
4 relate back to the original motion because the original motion was
5 based on the Debtor's false statements in his bankruptcy filings.
6 The UST did not discover the falsity of these statements until after
7 the deadline had passed for filing a motion based on the true facts.
8 The Debtor argued that the Court was required to observe the deadline
9 established by the Rule.

10 The Court will consider first the UST's request that the case be
11 dismissed under 11 U.S.C. § 707(a): i.e., for unreasonable delay
12 prejudicial to creditors. The 60 day time limit for filing a motion
13 to dismiss set forth in FRBP 1017(e) does not apply to a motion to
14 dismiss based on 11 U.S.C. § 707(a). See In re Tanenbaum, 210 B.R.
15 182, 187 (Bankr. D. Colo. 1997); In re Weeks, 306 B.R. 587, 589
16 (Bankr. E.D. Mich. 2004). As noted above, the UST contends that the
17 case could be dismissed on this ground because, by filing first for
18 chapter 13, for which he clearly did not qualify, the Debtor
19 unreasonably delayed the administration of the estate.

20 The Court will not dismiss the Debtor's case on this ground.
21 Arguably, the facts support a finding that the Debtor's conduct
22 unreasonably delayed the administration of the estate: i.e., if
23 "unreasonable" is construed to mean "without reason." If, on the
24 other hand, "unreasonable" is construed as meaning "for an
25 unreasonable period of time," the facts do not support such a
26 finding. The delay in question was not lengthy. More important, no

1 evidence has been presented that creditors have been prejudiced in
2 any meaningful way by the delay. One secured creditor obtained
3 relief from stay in March 2007. Shortly thereafter the chapter 7
4 trustee abandoned both parcels of real property owned by the Debtor.
5 There is no evidence that the Debtor had any other assets which could
6 have been liquidated to pay a dividend to unsecured creditors.

7 The UST's request that the case be dismissed based on 11 U.S.C.
8 § 707(b)(3) has merit. The Debtor clearly filed the chapter 13 case
9 in bad faith, knowing his secured debts exceeded the chapter 13 debt
10 limits and deliberately setting forth false income information. The
11 only issue is the timeliness of the motion. The UST contends that
12 the supplemental motion is timely because it relates back to the
13 original motion.

14 Rule 15(c) of the Federal Rules of Civil Procedure, made
15 applicable to this proceeding by FRBP 7015, provides that an amended
16 pleading relates back to the original pleading if it arises "out of
17 the conduct, transaction, or occurrence set forth...in the original
18 pleading...." See Markus v. Gschwend, 313 F.3d 1146, 1150 (9th Cir.
19 2002). The Court concludes that the supplemental motion does not
20 meet this test. The UST concedes that the original motion was based
21 on entirely different facts, which she only later realized were
22 false.

23 However, the UST also contended that the filing deadline should
24 be equitably tolled due to the Debtor's concealment of the true facts
25 regarding his pre-petition income. As noted by the United States
26 Supreme Court in Kontrick v. Ryan, 540 U.S. 443 (2004), deadlines

1 created by the Federal Rules of Bankruptcy Procedure are not
2 jurisdictional. For that reason, in a similar context, a bankruptcy
3 court recently concluded that a similar deadline was subject to
4 equitable tolling. See In re Rychalsky, 318 B.R. 61, 64 (Bankr. D.
5 Del. 2004).

6 Equitable tolling is appropriate when the claimant has acted
7 diligently but has been induced by the adverse party through trickery
8 or other misconduct to file a defective pleading or not to file at
9 all during the statutory period. See O'Donnell v. Vencor Inc., 466
10 F.3d 1104, 1113 (9th Cir. 2006). The Court finds that the application
11 of equitable tolling is appropriate here.

12 The UST asks that the case be dismissed with prejudice. If this
13 request is granted, the Debtor may refile but will be unable to
14 discharge any of the debts that exist at this time. The Court will
15 grant the request. The Debtor has admitted to purposely providing
16 materially false information to the Court. If the case were not
17 dismissed, this would be sufficient grounds for denial of his
18 discharge. Dismissing the case with prejudice accomplishes nothing
19 more than would take place with respect to these debts were the case
20 not dismissed, and the UST pursued this remedy.

21 CONCLUSION

22 An insufficient basis has been provided for dismissal under 11
23 U.S.C. § 707(a). With respect to the motion to dismiss under 11
24 U.S.C. § 707(b)(3), the motion to dismiss the case under 11 U.S.C. §
25 707(b)(3) will be granted. The basis for the supplemental motion is
26 too factually different from the original motion to relate back to it

1 for timeliness purposes. However, the Court concludes that the
2 deadline for such a motion should be equitably tolled. The UST has
3 acted diligently and was prevented from filing a timely motion based
4 on 11 U.S.C. § 707(b)(3) due to the Debtor's false statements
5 concerning his pre-petition income. Moreover, sufficient grounds
6 exist to warrant a dismissal with prejudice. The UST is directed to
7 submit a proposed order in accordance with this decision.

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